In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1027

DAN LEE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–5a) is reported at 403 F. 2d 1005.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1968. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 9, 1969, and the petition was filed on February 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

335-450—69

QUESTION PRESENTED

Whether petitioner was adequately notified of his duty to report for induction under the Selective Service Act.

REGULATIONS INVOLVED

32 C.F.R. 1642.2 provides, in pertinent part:

> When it becomes the duty of a registrant or other person to perform an act, * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty.

32 C.F.R. 1642.15 provides, in pertinent part:

> Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction * * * it shall thereafter be his continuing duty from day to day to report for induction * * * to his own local board, and to each local board whose area he enters or in whose area he remains.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Iowa, petitioner was convicted of willfully failing to comply with an order of his Selective Service board directing him to report for and submit to induction into the Armed Forces of the United States, in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for five years (R. 1, 31, 42). The court of appeals affirmed.

Petitioner registered with his Des Moines local draft board on March 16, 1959. His II–S student de-

ferment classification was changed to I–A on July 24, 1964, and he was duly notified of the change (Ford Tr. 4–6).[1] He was again classified as I–A and given notice thereof on August 27, 1964. He passed his physical examination and was so notified on May 31, 1966 (Ford Tr. 8–10). On September 2, 1966, the board mailed to petitioner in New York City an order requiring him to report for induction at Fort Des Moines, Iowa, on October 3, 1966.

On September 10, 1966, petitioner returned to the board his Order to Report for Induction and sought to appeal therefrom. The board replied that such an appeal was not timely, since over 30 days had elapsed since he had been given his I–A classification (Ford Tr. 12–13). On September 18, petitioner requested and was sent a conscientious objector form. Petitioner completed the form and returned it to the board on October 6—three days after the date on which he was ordered to report for induction (Ford Tr. 14–15). On October 31, 1966, the clerk of the board wrote petitioner (Ford Tr. 16–17):

> Please be advised that SSS Form 150, Conscientious Objector Form, was considered by the members of this Local Board at the October 28, 1966 meeting, and it was their unanimous opinion that the information presented did not merit reopening.

[1] "Ford Tr." refers to the transcript of the testimony of Mrs. Shirley Ford, clerk of the local board, which is on file with the Clerk of this Court. "White Tr." refers to the testimony of petitioner, which we are lodging with the Clerk of this Court.

> Your Order to Report for Induction is hereby returned. Please report to the nearest draft board and request a transfer for induction.

Petitioner never reported for induction.

Petitioner testified in his own behalf that he graduated from college in May 1964 and was employed by the New York City Department of Welfare (White Tr. 2–5). He had read the induction order, including the violation and penalty section, and understood it (White Tr. 17–18). He had replied on September 10, 1966, complaining of prejudice against Negroes in the Armed Forces and particularly of the treatment received by his father and brother when they were in the service (White Tr. 19–20). After the board, on October 31, 1966, rejected his application for conscientious objector status, he had replied, on December 19, 1966, that, because of his conscientious beliefs, he could not serve in the Armed Forces in any manner (White Tr. 27–28; see Pet. App. 3a, n. 6). He had concluded after talking with his brother, who had been in the service, that "for a colored man, the Armed Forces was simply no place to be" (White Tr. 54).[2]

ARGUMENT

Petitioner's contention that as a matter of law his conduct in failing and refusing to submit to induction was not willful and knowing finds no support in

[2] Following the verdict of guilty, the court told petitioner at the sentencing hearing that if he saw fit to agree to enter the Armed Forces thereafter the court would either suspend sentence or impose a sentence which would permit petitioner to submit to induction. Petitioner refused to accept the court's offer (see R. 53 *et seq.*).

the record. There was no ambiguity in the order of September 2, 1966, that petitioner report for induction at Fort Des Moines, Iowa, on the following October 3. Petitioner, a college graduate, admitted that he understood that order (*supra*, p. 4). Instead of complying, petitioner chose to apply for conscientious objector status after the date he was ordered to report. The leniency of the board in failing to have a prosecution instituted immediately and in giving petitioner another chance to report in no way condoned his failure to do so. Nor did it terminate or suspend the effectiveness of the induction order, as the court below noted (Pet. App. 4a).

Even if petitioner was justified in awaiting a response to his belated conscientious objector claim, as the trial court assumed (see Pet. App. 4a–5a), an induction order, as noted by the court below (Pet. App. 4a), imposes a continuing duty on the registrant to submit to induction. *United States* v. *Prince*, 398 F. 2d 686 (C.A. 2), certiorari denied, 393 U.S. 946; *Silverman* v. *United States*, 220 F. 2d 36 (C.A. 8); *United States* v. *Bendik*, 220 F. 2d 249 (C.A. 2).[3] Petitioner's claim to have been confused by the instructions received in the board's letter of October 31, 1966, is belied by his reply thereto which, in effect, told the board that he did not intend to submit to induction under any circumstances. The issue of willfulness was properly submitted to the jury under instructions not here challenged, and has been resolved

[3] See 32 C.F.R. 1642.2 and 32 C.F.R. 1642.15 (*supra*, p. 2), which provide both generally and particularly that the obligation here involved was of a continuing nature.

adversely to petitioner's contention. He was charged with failing to report for induction from October 3, 1966, up to the date of the indictment—July 18, 1967 (Pet. App. 3a). As the court below correctly concluded, "His continued refusal to report after being notified of the board's rejection of his claim supplied the necessary evidence of criminal intent and supports the conviction" (Pet. App. 5a).

CONCLUSION

It is therefore respectfully submitted that the petitin for a writ of certiorari should be denied.

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MARCH 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969